Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

JOHN W. LOTZ, JORGE GUTIERREZ AND JULIAN PANEK,

Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Circuit Court of Appeals erred in determining that Office of Personnel Management regulation defining the executive exemption of the Fair Labor Standards Act overtime provisions is valid despite the fact that it fails to include a salary-basis test as required by Department of Labor regulation 29 C.F.R. 541.118 (or, more specifically, the disciplinary-deduction exception to the salary-basis test) in determining the overtime exemption under the Fair Labor Standards Act when the District of Columbia Circuit Court of Appeals has concluded that such a test must be included?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioners: John W. Lotz, Jorge Gutierrez and Julian Panek, individuals.

Respondent: The United States.

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JOHN W. LOTZ, JORGE GUTIERREZ and JULIAN PANEK (hereinafter "Petitioners") by undersigned counsel, under appropriate rules of this Court, request that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit (hereinafter "Federal Circuit").

OPINIONS BELOW

The opinion of the Federal Circuit is published at 322 F.3d 1328 (Fed. Cir. 2003) and is set forth in Appendix B to this petition. The opinion of the United States Court of Federal Claims (hereinafter "CFC"), which dismissed Petitioners' claims, is published at 51 Fed. Cl. 460 (2002) and is set forth in Appendix C to this petition. This CFC opinion is based, in part, on a prior decision in a companion case, *Rowdy Adams et al. v. United States ("Adams"),* which is published at 40 Fed Cl. 303 (1998) and is set forth in Appendix D to this petition.

STATEMENT OF JURISDICTION

The decision of the Federal Circuit was entered in March 14, 2003. (App. B at 3a.) A timely Petition for Rehearing was filed with the Federal Circuit on April 22, 2003. An order denying the Petition for Rehearing and Rehearing En Banc, which is set forth in Appendix A to this petition, was filed May 15, 2003 (App. A at 1a.). This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2106.

RELEVANT PROVISIONS INVOLVED

This case involves the Fair Labor Standards Act of 1938, found at 29 U.S.C. §§ 201-219 (2000) (hereinafter "FLSA"); relevant portions of the Code of Federal Regulations (hereinafter "CFR") interpreting the FLSA; and a Congressional Report of the United States House of Representatives, FLSA Amendments of 1974, H.R. Rep. No. 93-913 (1974), reprinted in 1974 U.S.C.C.A.N. 2811. The relevant text of these provisions is set forth in Appendix E to this petition.

STATEMENT OF THE CASE

A. General Background of Litigation

Petitioners are three (3) of thirty-eight (38) plaintiffs in an FLSA case before the CFC: *John Bates et al. v. United States* (CFC case no. 96-931; entitled *Aaron Billings et al. v. United States* by the Federal Circuit (hereinafter *"Billings"*)). These thirty-eight plaintiffs were part of two companion matters before the CFC: (1) *Adams* (CFC case no. 96-93), which involves approximately 350 plaintiffs; and (2) *Kevin Barnes, et al. v. United States* (CFC case no. 97-150; hereinafter *"Barnes"*), which involves approximately 800 plaintiffs.

Each of the *Adams* and *Barnes* plaintiffs work as supervisors for the United States Border Patrol and have claimed that Respondent UNITED STATES (hereinafter "Respondent") has improperly denied payment of overtime under the FLSA. The legal issues in *Adams* and *Barnes* are identical. Individuals became plaintiffs in *Barnes* after *Adams* was closed to new plaintiffs. Orders in *Adams* apply to *Barnes*. After the CFC issued a number of decisions in *Adams*, at least a portion, if not all, of the thirty-eight *Billings*

plaintiffs' FLSA claims were severed from *Adams* and *Barnes* and placed in *Billings* in order to facilitate entry of judgment for successful plaintiffs in *Adams* and *Barnes*. (App. B at 8a.)

B. Petitioners' CFC Action

Petitioners are employed as GS-13 Assistant Chief Patrol Agents of Respondent's Border Patrol. (App C. at 19a.) Petitioners were originally plaintiffs in *Adams*. (App. C at 18a.)

Prior to severance of Petitioners' claims from *Adams* to *Billings,* while Petitioners were still plaintiffs in *Adams,* all of the *Adams* plaintiffs moved for summary judgment on the grounds that they did not meet the salary basis test of the Department of Labor ("DOL") regulations, which apply the FLSA to non-Federal employees. (App. D at 29a-30a.) Specifically, those *Adams* plaintiffs, which included Petitioners, argued that because they were subject to suspensions, as admitted by Respondent, Petitioners did not meet the salary basis test as required by DOL regulations. (App. D at 30a.) Petitioners' interpretation of the FLSA exemption was bolstered by a District of Columbia Circuit Court of Appeals ("hereinafter D.C. Circuit") case, *Am. Fed'n of Gov't Employees v. Office of Pers. Mgmt.* [821 F.2d 761 (D.C. Cir 1987) (hereinafter *"AFGE")],* which required that in the face of conflict, Office of Personnel Management ("OPM") regulations, which apply the FLSA to Federal employees, must defer to DOL regulations. (App. D at 32a-33a.)

In *Adams v. United States* [40 Fed. C1. 303 (1998)], the CFC issued a published decision denying Petitioners' summary judgment on the grounds that the OPM regulations, which apply the FLSA to Federal employees, do not, and need

not, contain the salary basis test required by DOL regulations. (App. D at 41a.)

Sometime later, Petitioners' claims were severed along with some other *Adams* and *Barnes* plaintiffs into this matter. (App. C at 18a.) After severance, Respondent moved for summary judgment against these three individuals on the grounds that Petitioners satisfied relevant exemptions from the overtime provisions of the FLSA. (App. C. at 18a.) The CFC granted Respondent's motion and issued a CFC Rule 54(b) judgment, effectively dismissing Petitioners' claims. (App. C at 26a.)

C. Petitioners' Federal Circuit Action

In their appeal to the Federal Circuit, Petitioners again challenged whether the OPM regulations defining the FLSA executive exemption are invalid because they conflict with the comparable DOL regulations by failing to include the salary basis test used in the DOL regulations. (App. B at 4a-6a.) Again, Petitioners argued that *AFGE* supported their argument. (App. B at 13a-14a.) The Federal Circuit affirmed the CFC decision, finding the relevant OPM regulations a "reasonable interpretation of the [FLSA]." (App. B at 5a.)

REASON FOR GRANTING THE WRIT

I. IF THIS FEDERAL CIRCUIT DECISION IS NOT REVERSED, IT WILL CREATE A CONFLICT BETWEEN CIRCUITS REGARDING INTERPRETATION OF THE FLSA

The FLSA requires any employer to compensate employees at a rate of at least one-and-one-half times the regular rate of pay for any work performed in excess of 40

hours per week. 29 U.S.C. § 207(a). However, "bona fide executive, administrative, or professional employees" are exempt from those overtime provisions. *Id.* § 213(a). The FLSA is primarily administered by the DOL under regulations implemented to interpret the FLSA. *See id.* § 204.

Under the DOL'S salary-basis test to the executive exemption, found at 29 C.F.R. 541.118, an employee who is paid on a salary basis is an employee paid "on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation which amount is not subject to reduction because of variations in the quality or quantity of the work performed." *(Id.* at 541.118(a)). The type of deduction that is the subject of this Petition is the regulation dealing with the so-called disciplinary deduction. 29 C.F.R. 541.118(a)(5). As this Court has previously resolved, under the disciplinary deduction rule of the salary-basis test, employees may be suspended without pay for "infractions of safety rules of major significance" but not for anything else. *Auer v. Robbins* 519 U.S. 452, 457 (1997). As such, the disciplinary deduction rule limits the executive exemption to preclude short-term suspensions for anything other than serious safety violations.

While the FLSA originally did not originally apply to Federal employees, who instead were governed by civil service statutes, Congress later applied the FLSA to Federal employees. 29 U.S.C. § 203(e)(2)(A). However, in order to ensure that the existing civil service statutes did not conflict with the FLSA, Congress gave the Civil Service Commission, which later became OPM, the authority to administer the FLSA with respect to Federal employees. 29 U.S.C. § 204(f). Importantly, in order to ensure equity and fairness between Federal and non-Federal employees, Congress has instructed that "[OPM] will administer the provisions of the [FLSA] in

such a manner as to assure consistency with the meaning, scope, and application established by the rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy." *See* FLSA Amendments of 1974, H.R. Rep. No. 93-913, at 28 (1974), reprinted in 1974 U.S.C.C.A.N. 2811, 2837-38.

In this case, despite the Federal Circuit's assertion to the contrary, its decision does, contradict a published decision of the D.C. Circuit. OPM regulations provide for neither the salary-basis test nor the disciplinary-deduction rule to apply to that test. *See* 5 C.F.R. 551.204. Since it was well established that application of the salary-basis test to Petitioners would render Petitioners non-exempt from FLSA overtime, Respondent argued that OPM'S regulations must apply to Petitioners. (App. D at 31a.)

In the Federal Circuit's decision, it acknowledges the argument made by Petitioners' counsel that if the *"AFGE"* case from the D.C. Circuit were followed, Petitioners would be due FLSA overtime. (App. B at 13a-14a.) As the Federal Circuit opinion quotes from the *AFGE* case, in resolving a conflict between an OPM regulation, which would have denied FLSA overtime to a group of federal employees, and a DOL regulation, which would have granted overtime to those same employees, "OPM must defer to the [FLSA] so that any employee entitled to overtime compensation under [the FLSA] receives it under the civil service rules." (App. B at 14a (*quoting AFGE* at 770-71).)

The Federal Circuit attempts to distinguish the facts in *AFGE* by stating the following: *"AFGE* stands for the unremarkable proposition that, under the same facts, an employee in federal employment should receive the same overtime compensation as an employee in the private sector.

In this case, however, the appellants are not employed under the same facts applicable to the private sector. Appellants, as federal employees, are subject to Title V suspensions not present in the private sector." (App. B at 14a.) Such a distinction is without merit.

While it is true that only Federal employees are subject to Title V suspensions, the *AFGE* case could never stand for the proposition characterized by the Federal Circuit, or OPM would never have to defer to DOL, and federal employees would never be subject to the DOL regulations as required by *AFGE*. Simply stated, only Federal employees are subject to Title V suspensions. If all the Federal government had to do in order to avoid having to defer to DOL regulations was show some difference between the employments of its employees from the employment of employees in the private sector, *AFGE* would be rendered meaningless. As the Federal Circuit acknowledged, "Title V applies to a vast majority of all federal employees." (App. B at 13a.) If the Title V distinction were enough to render DOL regulations invalid in the face of conflicting OPM regulations, OPM would never have to defer to DOL regulations. This interpretation of *AFGE* must clearly fail.

CONCLUSION

If this Federal Circuit opinion is left standing, Petitioners will be faced with the troubling notion that if they were before the D.C. Circuit, they would have undoubtedly prevailed on their FLSA overtime claims. Despite the Federal Circuit's attempts to the contrary, there can be no doubt that this decision is in direct conflict with the D.C. Circuit's *AFGE* decision.

In order to resolve this conflict, a Petition for a Writ of Certiorari should be granted. Otherwise, future FLSA litigants will be forced to forum shop between the very two Circuits best designed to deal with overtime claims from Federal employees for the most favorable court to hear their FLSA claims.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

02-5069

[Filed May 15, 2003]

Aaron Billings, Danny M. Brinson,	)
Alejandro Fuentez, Miles Furman,	)
Harry Hathaway, Walter Kittle,	)
Clark Larson, Jose Maruffo,	)
Johnny Meadors, Richard Moody,	)
Eduardo Ramirez, Jesse Shaw,	)
Randy Warrick and Charles Whitmire,	)
John Bates, Bruce Cooke, Gerald Kern,	)
Donald Barley, Alfredo Borrego,	)
Ernesto Castillo, Kenneth Moniere,	)
Rolfe Raines, Rowdy D. Adams,	)
Larry G. Arthurs, David Estevis,	)
Manuel Flores, Robert Gilbert,	)
William Jumbeck, Herbert Monette,	)
John E. Munch, David Trevino,	)
Lauro Vidal, Ronald Vitiello, Randle West	)
and Daniel Doty,	)
Plaintiffs,	)
and	)
	)
John W. Lotz, Jorge Gutierrez and	)
Julian J. Panek,	)
Plaintiffs-Appellants,	)

v.)
)
United States,)
Defendant-Appellee.)
)

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANTS, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on May 22, 2003.

FOR THE COURT,

/s/ _____
Jan Horbally
Clerk

Dated: May 15, 2003

cc: Everett L. Bobbitt
Allison A. Page

BATES v. US, 02-5069
(CFC-96-CV-931)

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

02-5069

[Decided March 14, 2003]

Aaron Billings, Danny M. Brinson, Alejandro Fuentez, Miles Furman, Harry Hathaway, Walter Kittle, Clark Larson, Jose Maruffo, Johnny Meadors, Richard Moody, Eduardo Ramirez, Jesse Shaw, Randy Warrick and Charles Whitmire, John Bates, Bruce Cooke, Gerald Kern, Donald Barley, Alfredo Borrego, Ernesto Castillo, Kenneth Moniere, Rolfe Raines, Rowdy D. Adams, Larry G. Arthurs, David Estevis, Manuel Flores, Robert Gilbert, William Jumbeck, Herbert Monette, John E. Munch, David Trevino, Lauro Vidal, Ronald Vitiello, Randle West and Daniel Doty,

Plaintiffs,

and

John W. Lotz, Jorge Gutierrez and Julian J. Panek,

Plaintiffs-Appellants,

v.

United States,
Defendant-Appellee.

Everett L. Bobbitt, Bobbitt & Pinckard, APC, of San Diego, California, argued for plaintiffs-appellants. With him on the brief was Bradley M. Fields.

Allison A. Page, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief were Robert D. McCallum, Jr., Assistant Attorney General; and David M. Cohen, Director.

Appealed from United States Court of Federal Claims
Senior Judge Eric Bruggink

JUDGES:
Before Clevenger, Radar, and Linn, Circuit Judges.
LINN, Circuit Judge.

OPINION

John W. Lotz, Jorge Gutierrez, and Julian Panek (collectively "appellants") appeal the dismissal of their complaint seeking overtime pay under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2000). The Court of Federal Claims dismissed the appellants' complaint following a grant of summary judgment in favor of the government based on a determination that the appellants fell within the executive exemption of the overtime provisions. *Bates v. United States*, 51 Fed. Cl. 460 (2002). Appellants

also appeal the implicit denial of their cross-motion for summary judgment that the regulation of the Office of Personnel Management ("OPM"), defining the executive exemption, is invalid because it conflicts with the comparable Department of Labor ("Labor Department") standard and therefore may not be used. *Id.* Because the OPM regulation is a reasonable interpretation of the Fair Labor Standards Act and because there is no dispute as to the relevant facts, we *affirm* the grant of summary judgment in favor of the government, the implicit denial of appellants' motion for summary judgment, and the dismissal of appellants' claims.

BACKGROUND

This case is part of an extended litigation, originally involving approximately 300 plaintiff "Supervisory Border Patrol Agents" and "Supervisory Aircraft Pilots" employed in various capacities by the U.S. Border Patrol at grades ranging from GS-11 to GS-14. *Adams v. United States*, 40 Fed. Cl. 303 (1998) ("*Adams I*"). Each of the plaintiffs had worked an unspecified amount of overtime but had not been compensated at an overtime rate for this work. The plaintiffs filed suit seeking overtime pay under the Fair Labor Standards Act, which requires that an employer must compensate an employee for overtime work at a rate of at least one-and-one-half times the employee's regular rate of pay. 29 U.S.C. §207(a) (2000). The government, however, considered the plaintiffs to be "executives" and, as such, determined the plaintiffs were exempt from the overtime provisions. *Id.* §213(a) (exempting "bona fide executive, administrative, or professional" employees from § 207(a)). This determination was based on an OPM regulation, defining an executive employee as a "supervisor, foreman, or manager

who manages a Federal agency or any subdivision thereof . . . and regularly and customarily directs the work of at least three subordinate employees . . . ." 5 C.F.R. § 551.204 (1997). Additional criteria include primary management duty; authority or influence over hiring, firing, or promoting; regular exercise of discretion; and supervision of others' work. *Id.* § 551.204(a). The government also presented evidence that the appellants were "administrative" employees, and also therefore exempt. The analysis and arguments for "executive" and "administrative" are essentially the same.

The plaintiffs filed a motion for summary judgment, arguing that the OPM regulation setting forth the definition of an "executive" employee was invalid because it conflicted with the definition of "executive" as set forth by the Labor Department. For a position to be deemed "executive" under Labor Department regulations, the employee must be paid on a "salary basis", among other requirements. 29 C.F.R. pt. 541 (1997). To be paid on a salary basis means that the employee must receive "on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." *Id.* § 541.118(a). The salary basis test is further refined to permit certain penalty deductions from pay as consistent with salaried employment, but to disallow others. Consistent with salaried status, employees may be suspended without pay "for infractions of safety rules of major significance," *Id.* § 541.118(a)(5) ("disciplinary deduction rule"), but not for anything other than violating a major safety rule. *See Auer v. Robbins*, 519 U.S. 452, 137 L. Ed. 2d 79, 117 S. Ct. 905 (1997). Because OPM administers the Fair Labor Standards Act with respect to employees of the federal

government, it is the OPM regulations, rather than the Labor Department regulations, that govern the application of the Fair Labor Standards Act to appellants. To be valid, however, the OPM regulation must be consistent with the Labor Department regulation. Because the OPM regulation does not contain a salary-basis test, the plaintiffs argued that the OPM and Labor Department regulations were inconsistent, that the OPM regulation was thus invalid, and that the Labor Department standard should be applied instead.

Under the Labor Department regulations, the plaintiffs argued, they would be non-exempt, or entitled to overtime compensation. The plaintiffs offered evidence that they were subject to suspensions under Title V of the United States Code. *See* 5 U.S.C. §§ 7501-7504 (2000) (Any individual in the competitive service who is not a probationary or who has completed one year of continuous employment in the same position may be suspended for periods of less than fourteen days for such cause as will promote the efficiency of the service, including discourteous behavior.). The Administrative Manual for the Immigration and Naturalization Service ("INS") also details offenses for which suspensions may be imposed on INS employees, including plaintiffs, such as losing a pager, taking a service vehicle home for personal use, and non-hygienic personal appearance. The plaintiffs also submitted evidence that, not only were these suspensions available disciplinary tools, they were also imposed regularly. As such, plaintiffs argued that they could not be exempt employees under the Labor Department's "executive" definition, because they failed to meet the salary-basis test. The government filed a cross-motion for summary judgment, arguing that the OPM regulation was valid and that the

plaintiffs fell squarely within the regulation's definition of "executive."

The Court of Federal Claims denied plaintiffs' motion for summary judgment, holding that OPM's regulation was a reasonable interpretation of the Fair Labor Standards Act within the federal sector. *Adams I*, 40 Fed. Cl. at 308. The Court of Federal Claims also denied the government's motion for summary judgment for failure to meet its burden of establishing that the plaintiffs "plainly and unmistakably fell 'within the terms and spirit of the exemption. . . .'" *Id.* (*quoting Baca v. United States*, 29 Fed. Cl. 354, 359 (1993)).

A trial was then held, with a number of representative plaintiffs being appointed for purposes of classification. After the trial, the Court of Federal Claims held, *inter alia*, that Assistant Chief Patrol Agents ("Assistant Chiefs") at the United States Border Patrol Academy ("Academy"), a classification including the appellants, who were represented by designated plaintiff Paul Beeson ("Beeson"), were exempt from Fair Labor Standards Act overtime provisions. *Adams v. United States*, 44 Fed. Cl. 772, 785 (1999). The appellants and Beeson subsequently moved for a new trial, arguing prejudice because Beeson did not provide live testimony at the trial. Beeson later withdrew his claim, leaving only the three appellants in this case. The motion for a new trial was granted and the unsuccessful plaintiffs (including appellants and others) were severed from *Adams* so that the successful plaintiffs could be awarded damages. The current case continued under the caption *Bates v. United States*, No. 96-931.

Prior to the new trial, appellants filed a motion for summary judgment, arguing first, that their primary duties do not satisfy the requirements for the "executive" exemption to the Fair Labor Standards Act provision, and second, raising again the argument that the OPM standard is inconsistent with Labor Department regulations and may not be used. The government filed a cross-motion for summary judgment, contending that appellants fell squarely within the "executive" exemption and pointing out that appellants' argument about OPM versus Labor Department standards was resolved in favor of the OPM regulation earlier, in *Adams I*. 40 Fed. Cl. at 305.

The Court of Federal Claims reviewed the role of the Assistant Chiefs and determined that their duties were within the realm of "executive" employees under the relevant OPM regulation. Specifically, the Court found that the three Assistant Chief appellants together supervise the five departments at the Academy on a rotating basis. Each department has a Training Operations Supervisor that reports directly to one of the Assistant Chiefs. The Academy also employs some fifty Course Development Instructors that report directly to a Training Operations Supervisor, and indirectly to an Assistant Chief. Each Assistant Chief "plays a substantial role in the development of Academy curriculum and maintenance of its facilities. He formulates and executes management programs or policies, such as revising courses and recommending disciplinary action for subordinates . . . ." *Bates*, 51 Fed. Cl. at 463. Moreover, each Assistant Chief participates in the selection, removal, or promotion of other employees. *Id.* at 464. Because it held the OPM regulation to be valid and applicable, the Court of Federal Claims held the appellants to be exempt as "executive" employees based on

the undisputed facts recited above. The Court of Federal Claims also considered the applicable facts under the Labor Department regulations, and without regard to the salary basis test, found that the appellants would be "executive" employees under the Labor Department standard as well. *Id.* at 463-64.

The government's summary judgment motion was granted and the appellants' complaint was dismissed. Appellants filed a timely appeal with this court, arguing yet again that the Labor Department standards, rather than the OPM standards, should be applied. Because they are subject to suspensions under Title V and the INS Administrative Manual, appellants argue that under the Labor Department regulations, they would be non-exempt as they do not meet the salary-basis test. We have jurisdiction pursuant to 28 U.S.C.§ 1295(a)(3).

DISCUSSION

I. Standard of Review

This court reviews the Court of Federal Claims' grant of summary judgment de novo. *Cook v. United States*, 86 F.3d 1095, 1097 (Fed. Cir. 1996). The underlying issue, one of statutory and regulatory construction, is a question of law which we also review de novo. *Frederick v. Dep't of Justice*, 73 F.3d 349, 351-52 (Fed. Cir. 1996).

II. Analysis

The Fair Labor Standards Act, first enacted in 1938, requires an employer, *inter alia*, to compensate an employee at one-and-one-half times the regular pay rate for any work

performed in excess of 40 hours per week. 29 U.S.C.§207(a) (2000). This provision, however, does not apply to "exempt" employees, such as those employed "in a bona fide executive, administrative, or professional capacity." *Id.* § 213(a). The Fair Labor Standards Act is administered by the Labor Department under regulations it has implemented under the Act. Prior to 1974, the Fair Labor Standards Act did not apply to federal employees, and overtime entitlements were governed by civil service statutes. In 1974, Congress amended the Fair Labor Standards Act to include federal employees, Pub. L. No. 93-259, 88 Stat. 55 (1974) (codified in pertinent part at 29 U.S.C. § 203(e)(2)(A)), despite the Civil Service Commission's objections that existing civil service overtime laws were adequate and the Fair Labor Standards Act coverage would simply confuse administration of the two overtime provisions. *See* Fair Labor Standards Amendments of 1974, H.R. Rep. No. 93-913, at 28 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811 [hereinafter "House Report"]. Congress resolved this potential conflict by giving the Civil Service Commission (now OPM) the authority to administer the Fair Labor Standards Act with respect to federal employees. 29 U.S.C. § 204(f) (2000). In resolving conflicts between OPM administration and Labor Department administration, Congress has instructed that "[OPM] will administer the provisions of the [Fair Labor Standards Act] in such a manner as to assure consistency with the meaning, scope, and application established by the rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy." House Report at 28. The civil service provisions in place before passage of the 1974 amendments remained in effect, to the extent they were not inconsistent with the Fair Labor Standards Act. *Id.*

The crux of appellants' case is the contention that the OPM definition of "executive" employee conflicts with the Labor Department definition of "executive" employee, based on the omission of the salary-basis test in the OPM definition. Appellants argue that, faced with this inconsistency, the Labor Department definition must be applied. Based on the undisputed facts, appellants assert that, under the Labor Department definition, they are non-exempt employees and are entitled to overtime pay.

If a statute being interpreted is silent or ambiguous with respect to a certain issue, "the question for the court is whether the agency's [interpretation] is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 848, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). Agency interpretations of statutes, and in particular, those interpretations that are the products of notice-and-comment rulemaking promulgated in the exercise of authority delegated to the agency by Congress, are entitled to *Chevron* deference. *James v. Von Zemenszky*, 301 F.3d 1364, 1365 (Fed. Cir. 2002) (*citing United States v. Mead Corp.*, 533 U.S. 218, 230, 150 L. Ed. 2d 292, 121 S. Ct. 2164 (2001)). Further, "'a long-standing interpretation given a statute by the agency charged with administering it should be deferred to unless it is unreasonable." *Jones v. Dep't of Transp.*, 295 F.3d 1298, 1307 (Fed. Cir. 2002).

Here, the Fair Labor Standards Act statute is silent on the definition of "executive" employee. Filling that gap, OPM implemented the regulation at issue. The OPM regulation was produced through notice-and-comment rulemaking under OPM's "authority to determine how the [Fair Labor Standards Act] would be administered in the civil service."

Am. Fed'n of Gov't Employees v. Office of Pers. Mgmt., 261 U.S. App. D.C. 273, 821 F.2d 761, 770 (D.C. Cir. 1987) ("*AFGE*"); 29 U.S.C. § 204(f) (2000).

Thus, we must first determine whether the OPM interpretation of the statute is reasonable, as well as whether any difference between OPM's interpretation and the Labor Department standard is required to effectuate the consistency of application of the provision to both federal and non-federal employees. *See, e.g., Zumerling v. Devine,* 769 F.2d 745, 750 (OPM's guidelines must "harmonize with the statute's 'origin and purpose,' . . . as well as with the Secretary of Labor's regulations." (internal citations omitted)).

We conclude that the OPM definition of an "executive" employee is a reasonable interpretation of the Fair Labor Standards Act. As noted above, federal employees are subject to suspensions under Title V that are not applicable in the private sector. Under the interpretation urged by appellants, nearly every federal employee would be considered non-exempt because Title V applies to a vast majority of all federal employees. Because of the peculiar nature of the statutory framework surrounding federal employment, it is reasonable for OPM's regulation to vary from the Labor Department standard. Moreover, in reviewing the OPM and Labor Department definitions, the regulations are nearly identical, but for the salary-basis test. Thus, the variance in OPM's regulation is no more than needed to accommodate the difference between private and public sector employment. We see no error in the determination by the Court of Federal Claims that the OPM regulation is a reasonable application of the Fair Labor Standards Act to the federal sector.

Appellants argue that their position--that the OPM regulation is invalid because it is inconsistent with the Labor Department regulations--is supported by the *AFGE* case. In the *AFGE* case, a challenge was made to an OPM regulation providing that all federal employees classified as GS-11 or above were presumptively exempt. This regulation conflicted with a Labor Department regulation that stated that all employees are presumptively non-exempt. In resolving the conflict, the D.C. Circuit stated that "OPM must defer to the [Fair Labor Standards Act] so that any employee entitled to overtime compensation under [the Fair Labor Standards Act] receives it under the civil service rules." *AFGE,* 821 F.2d at 770-71. In the present case, because the Court of Federal Claims determined that appellants would have received overtime compensation under the Labor Department standards, appellants argue that *AFGE* requires that they be compensated.

First, despite appellants' assertion, the *AFGE* case is not binding precedent on this court. Second, *AFGE* fails to support appellants' argument. *AFGE* stands for the unremarkable proposition that, under the same facts, an employee in federal employment should receive the same overtime compensation as an employee in the private sector. In this case, however, the appellants are not employed under the same facts applicable to the private sector. Appellants, as federal employees, are subject to Title V suspensions not present in the private sector.

Appellants also argue that this case is analogous to *Auer v. Robbins*, 519 U.S. 452, 137 L. Ed. 2d 79, 117 S. Ct. 905 (1997). The *Auer* case involved law enforcement officers for the city of St. Louis. Although the officers were supervisory

employees, they were subject to suspensions without pay. As such, the officers fell outside of the "executive" employee definition under Labor Department regulations and were entitled to overtime pay. The St. Louis Police Department argued that the officers should be considered "executive" employees because the suspensions were required for disciplinary purposes. The Court concluded that other disciplinary measures were available and thus, declined to ignore the salary-basis test of the Labor Department standard. The Court thus held the officers to be non-exempt employees. The *Auer* case is distinguishable from the present case, because *Auer* involved municipal, not federal, employees, acting under a disciplinary scheme different from the federal sector. The suspensions at issue in the present case are not matters of disciplinary choice, as they were in *Auer*. Instead, the suspensions are statutorily provided for by Congress under Title V to apply to all agency employers within the executive branch. The employer in *Auer*, the St. Louis Police Department, was free to choose a non-suspension disciplinary scheme for its "executive" employees; agencies within the federal government, the INS in this case, are not similarly free to override Title V. Title V provides for suspensions for "any individual in the competitive service who is not a probationary or who has completed 1 year of service of continuous employment in the same position." 5 U.S.C. §§7501, 7503 (2000). This disciplinary framework, chosen by Congress, is what dictates the disciplinary scheme for federal employees. Unlike *Auer*, agencies cannot work outside of this statutory framework.

Appellants also argue that OPM has adopted regulations to ensure that federal employees receive the maximum overtime compensation under any authority which is going to

provide the greater overtime entitlement during a work week. 5 C.F.R. §551.513 (2002). Because appellants did not raise this issue before the Court of Federal Claims, we need not and do not address it. *Southfork Sys. v. United States*, 141 F.3d 1124, 1132 n.3 (Fed. Cir. 1998) ("We generally do not consider arguments that are raised for the first time on appeal.") (*citing Sage Prods., Inc. v. Devon Indus., Inc.*, 126 F.3d 1420, 1426 (Fed. Cir. 1997)).

CONCLUSION

Because there is no genuine issue of material fact in this case and because the OPM regulation defining "executive" employees is a reasonable interpretation of the Fair Labor Standards Act, the Court of Federal Claims' grant of summary judgment in favor of the government is affirmed.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 96-931

[Filed January 15, 2002]

JOHN BATES, et al., *Plaintiffs*,	)
v.	)
THE UNITED STATES, *Defendant*.	)

Civilian pay; FLSA Overtime; Administrative and Executive exemptions.

Everett L. Bobbitt and *Sanford A. Toyen*, San Diego, CA for plaintiffs.

Allison Paige, U.S. Department of Justice, Civil Division, Commercial Litigation Branch, argued for defendant. With whom on the briefs were *Robert D. McCallum*, Assistant Attorney General, and *David M. Cohen*, Director.

OPINION

BRUGGINK, *Judge*.

Pending before the court in this overtime pay case are cross-motions for summary judgment on the claims of plaintiffs Jorge Gutierrez, John W. Lotz, and Julian J. Panek. The question is whether these plaintiffs are exempt from the overtime provisions of the Federal Labor Standards Act (FLSA), 29 U.S.C. 201-19 (1994). Defendant claims that the plaintiffs' positions are "executive" or "administrative" and, hence, exempt. *See id.* at § 213(a). For reasons set out below, we agree with defendant.

BACKGROUND[1]

This case is part of litigation that has extended for five years. Plaintiffs were originally litigants in *Adams v. United States*, 44 Fed. Cl. 772 (1999), in which we held that first line GS-12 supervisory border patrol agents who were not either Patrol Agents In Charge or Assistant Patrol Agents In Charge had been improperly denied overtime pay. The court also found, after trial, that these three plaintiffs, whose designated representative was Mr. Paul Beeson, were exempt from FLSA overtime provisions. These three plaintiffs and Mr. Beeson sought a new trial arguing that they were prejudiced by the court's ruling in the absence of Mr. Beeson's live testimony. The court granted the plaintiffs' motion for a new trial. The current plaintiffs were severed from the *Adams* case so that damages could be calculated for other plaintiffs, who were owed backpay.

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[1] The facts are taken from the parties' proposed findings of uncontroverted facts to the extent that they are undisputed.

Mr. Beeson later withdrew his claim. The court then directed defendant to file a motion for summary judgment with respect to Messrs. Gutierrez, Lotz, and Panek. On April 20, 2001 the court granted defendant's request to take the deposition of one of the individuals. The court's order states that "given the parties' prior agreement that Beeson represented all four employees, deposing one plaintiff of defendant's choosing should be sufficient." Mr. Gutierrez was designated by the parties as the individual to be deposed. He would also represent the other two plaintiffs.

The current plaintiffs are GS-13 Supervisory Border Patrol Agents who serve as Assistant Chief Patrol Agents ("Assistant Chief") at the United States Border Patrol Academy in Charleston, South Carolina. Mr. Gutierrez has held this position since November of 1995. Mr. Gutierrez testified that the Border Patrol Academy exists to provide the tools to Border Patrol Agents to perform their duties. The Border Patrol Academy conducts twenty-five sessions per year lasting between nineteen and twenty-one weeks each. Throughout the year, between eight and ten class session are proceeding at the Academy, enrolling a total of between 300 and 400 trainees.

The Deputy Chief Patrol Agent supervises the three Assistant Chiefs: Messrs. Gutierrez, Lotz, and Panek. The Academy has five separate departments: Law, Physical Training, Spanish, Firearms, and Driver Training. Mr. Gutierrez supervises the Law and Physical Training Departments. The other two Assistant Chiefs supervise the Driver Training, Firearms, and Spanish Departments. The Assistant Chiefs rotate as supervisors of the five departments on an annual basis.

Each department has a Training Operations Supervisor who reports to the assigned Assistant Chief. There are also approximately 50 Course Development Instructors who are permanently assigned to the facility. They report to the Training Operations Supervisor. Mr. Gutierrez is the first-line supervisor for the Training Operations Supervisors and the second-line supervisor for the Course Development Instructors in the two departments he supervises.

In his deposition Mr. Gutierrez testified that he has supervisory duties related to the facilities including hurricane evacuations and relocation of the students in the event of a weekend mechanical problem. He can write changes in a course or presentation for the departments assigned to him and must keep abreast of developments in law that affect the course work in the various departments at the Academy. He has also participates in the process of selecting personnel.[2]

Mr. Gutierrez's other duties include: review of adverse actions taken by instructors; review of investigations in other departments; and budgeting for materials and class needs (including computers and phone systems). His responsibilities include approval of emergency leave if a student has a death in the family. Mr. Gutierrez is on-call 24 hours a day. He is a certified contracting officer with a $ 25,000 warrant. Mr. Gutierrez has taken basic and advanced management courses.

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[2] It is clear from the content of Mr. Gutierrez's deposition that he helped select personnel for the Academy, contrary to plaintiffs' suggestion that he only participates in the selection of border patrol trainees. He testified that he "did a lot of administrative work as far as the administrative selection process of personnel." Def.'s App. 20:15-16.

He occasionally conducts classes at the Academy and has participated in on-site training that the Academy provides at other locations.

DISCUSSION

The government has the burden of proving an FLSA exemption. *Adams*, 44 Fed. Cl. at 775 (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97, 41 L. Ed. 2d 1, 94 S. Ct. 2223 (1974); *Berg v. Newman*, 982 F.2d 500, 503 (Fed. Cir. 1992); 5 C.F.R. § 551.202(c) (1999)). The defendant believes it has established that plaintiffs satisfy the criteria for the "administrative exemption" from the FLSA overtime provisions.[3] The plaintiffs disagree.

The administrative exemption applies, insofar as relevant here, to:

> [A]n advisor or assistant to management, a representative of management, or a specialist in a management or general business function or supporting service, . . .[who], meets all . . . of the following criteria:
>
> (a) *Primary duty test*. The primary duty test is met if the employee's work–

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[3] Defendant has not waived its defense that the administrative exception applies, nor are plaintiffs prejudiced by its assertion. Plaintiffs have had ample time to respond on the merits.

> (1)Significantly affects the formulation or execution of management programs or policies; or
>
> (2) Involves management or general business functions or supporting services of substantial importance to the organization serviced; or
>
> (3) Involves substantial participation in the executive or administrative functions of a management official.
>
> (b) *Nonmanual work test*. The employee performs office or other predominantly nonmanual work which is–
>
> (1) Intellectual and varied in nature; or
>
> (2) Of a specialized or technical nature that requires considerable special training, experience, or knowledge.
>
> (c) *Discretion and independent judgment test*. The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

5 C.F.R. § 551.206 (2001).

Plaintiffs do not contest the last two elements of this test--that their positions involve non-manual work and require discretion and independent judgment. They argue however, that their primary duties do not "significantly affect[] the formulation or execution of management programs and policies" nor do their duties "involve[] supporting services of

substantial importance to the organization serviced." *Id.* We disagree.

Mr. Gutierrez plays a substantial role in the development of Academy curriculum and the maintenance of its facilities. He formulates and executes management programs or policies, such as revising courses and recommending disciplinary action for subordinates, and is involved in important supporting services to the Border Patrol, namely, providing training for incoming border patrol agents. Mr. Gutierrez serves directly under the Chief Patrol Agent, making his position second ranking at the Academy. He supervises the Training Operations Supervisor and the Course Development Instructors. He is on call 24 hours a day. His primary duties clearly involve all three elements of the primary duty test.

Plaintiffs' duties also satisfy the more rigorous "executive exemption." The exemption applies, insofar as relevant here, to:

> [A] supervisor or manager who manages a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and customarily and regularly directs the work of subordinate employees and meets . . . the following criteria:
>
> (a) *Primary duty test*. The primary duty test is met if the employee–
>
> (1) Has authority to make personnel changes that include, but are not limited to,

> selecting, removing, advancing in pay, or promoting subordinate employees, or has authority to suggest or recommend such actions with particular consideration given to these suggestions and recommendations; and
>
> (2) Customarily and regularly exercises discretion and independent judgment in such activities as work planning and organization; work assignment, direction, review, and evaluation; and other aspects of management of subordinates, including personnel administration.

5 C.F.R. § 551.205.

Plaintiffs contend that these Office of Personnel Management (OPM) standards for executive exemption, are in conflict with the comparable Department of Labor (DoL) standards and therefore may not be used. Defendant points out this dispute was resolved earlier in the litigation, in favor of the OPM regulations. In *Adams v. United States*, 40 Fed. Cl. 303, 305 (1998), the court stated, "it is clear from the plain language of the statute that OPM is empowered to administer FLSA with respect to plaintiffs." The court held that "it is contrary to Congress's express wish to . . . require OPM to precisely mimic DoL's every regulatory move." *Id.* at 308.

Assuming the DoL standards apply, plaintiffs point to the fact that the term "executive," as defined by the DoL, requires that the employee have authority to recommend selection and removal:

> (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight;

29 C.F.R. § 541.1. There is little difference, however, between the OPM and DoL requirements. We do not find them to be inconsistent, and, in any event, plaintiffs satisfy both standards.

Mr. Gutierrez has authority to suggest selection, removal, or promotion as required by the OPM's regulations and he makes recommendations as to the hiring and advancement of other employees as required by the DoL regulations. Mr. Gutierrez testified that "in the selection process for [an instructor] vacancy here at the Academy, I do review their applications and make recommendations to the chief patrol agent." Def. App. 31:22-24. He stated that he recommends disciplinary action for employees at the Academy and signs paperwork for step increases. He also stated that "as far as individuals are concerned, I do their appraisals and I oversee their work and their departments more so into ensuring that they have the material and personnel that they need." Def. App. 21:7-10. These duties satisfy the OPM and DoL "executive" criteria.

In *Adams v. United States*, the court described Mr. Beeson, the previously designated representative, as:

> ha[ving] day-to-day responsibility for supervising the training unit. He is the first-

> line supervisor of the Academy's permanent instructional staff and for supervisory agents detailed to the Academy as instructors. He plans and oversees the execution of the instructional program for both trainers and trainees.

44 Fed. Cl. 772 at 785. We reach the same result with respect to Mr. Gutierrez, and, thus, with respect to the two other plaintiffs. All three are properly classified as holding executive positions. They are thus exempt from the FLSA overtime provisions and are not entitled to backpay.

CONCLUSION

Defendant has satisfied its burden of proof as to the exemption status of plaintiffs Gutierrez, Lotz, and Panek. Accordingly, defendant's motion for summary judgment is granted as to them. Pursuant to Rule 54(b) and there being no just cause for delay, the clerk is directed to dismiss these plaintiffs from the complaint. Judgment accordingly. Each party to bear its own costs.

/s/ _____
Eric G. Bruggink, Judge

APPENDIX D

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 96-93

[Filed January 30, 1998]

ROWDY ADAMS, *et al.*, *Plaintiffs*,

v.

THE UNITED STATES, *Defendant*.

Everett L. Bobbitt, argued for plaintiffs, With him on the briefs was *Sanford A. Toyen*.

Agnes M. Brown, U.S. Department of Justice, argued for defendant, With her on the briefs were *Frank W. Hunger*, Assistant Attorney General, and *David M. Cohen*, Director.

OPINION

BRUGGINK, *Judge*

This overtime pay dispute is before the court on the parties' cross-motions for summary judgment. The motions have been fully briefed and argued, and are ready for

disposition. For the reasons set forth below, both motions are denied.

BACKGROUND

Plaintiffs are or were approximately 300 "Supervisory Border Patrol Agents" and "Supervisory Aircraft Pilots" employed by the U. S Border Patrol at grades ranging from GS-11 to GS-14.[1] They worked an unknown amount of overtime but were not paid for it because defendant considers "Supervisory Border Patrol Agents" and "Supervisory Aircraft Pilots" to be exempt from the Fair Labor Standard Act's overtime pay requirements because they are "executives."

The Fair Labor Standards Act ("FLSA"), 29 U.S.C.A. §§201-219 (West Supp. 1997), requires an employer,

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[1] In its First Amended Answer, the government denied that plaintiffs number 2, 10, 17, 19, 26, 51, 52, 59, 60, 66, 83, 90, 96, 101, 147, 176, 181, 183, 195, 197, 209, 215, 216, 218, 223, 224, 253, 258, 282, 319, 326, 334, 343, 347, 361, 362, and 363 were "Supervisors" employed by the Border Patrol. In addition, the court notes that plaintiffs number 2, 33, 83, 101, and 147 were separately dismissed by prior orders. Also, according to the complaint, some plaintiffs were non-supervisory "Aircraft Pilots." It is unclear at present whether the government considers "Aircraft Pilots" to be exempt employees. Finally, there is confusion in the pleadings as to the status of Mr. Norbert Gomez, who has submitted a declaration in support of his claims, but who is not formally named in the caption as a plaintiff. The court cannot rule on his claims until the complaint has been amended to include him, and leave to do so is hereby granted.

including the federal government, to compensate an employee for overtime work at a rate of at least one-and-one-half times the employee's regular rate of pay. *Id.* § 207(a). However, "bona fide executive, administrative, or professional" employees are exempt from the FLSA's overtime provisions. *Id.* § 213(a). The Department of Labor ("DoL") is primarily responsible for administering FLSA. *See id.* § 204. But in the case of most federal employees, including plaintiffs, the statute is administered by the Office of Personnel Management ("OPM"). *See id.* §§ 204(f), 213(a).

Plaintiffs maintain that if DoL regulations were applied to them instead of OPM regulations, they would be considered exempt from FLSA's overtime pay requirements. In order for a position to be exempt under DoL regulations defining executives, an employee must, among other things, be paid on a salary basis. *See* 29 C.F.R. pt. 541 (1997).[2] This means the employee must receive "on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work

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[2] The DoL regulations are lengthy and detailed. Subpart A of the regulations, the "General Regulations" define "executive employee" by reference to six criteria. These are: (a) primary management duties, (b) supervisory powers over others' work, (c) hiring/firing authority, (d) regular exercise of discretion, (e) limited time performing work other than that described in (a)-(d), and (f) compensation based on a minimum salary. *See* 29 C.F.R. § 541.1 (1997). Subpart B of the regulation describes how to interpret these six criteria. How to evaluate criterion (f) is explained by the salary-basis test set forth at 29 C.F.R. § 541.118 (1997), and quoted in pertinent part in the text.

performed." 29 C.F.R. § 541.118(a). The salary-basis test is further refined to permit certain penalty deductions from pay as consistent with salaried employment, but disallow others. Consistent with salaried status, employees may be suspended without pay for "infractions of safety rules of major significance," 29 C.F.R. § 541.118(a)(5) ("disciplinary deduction rule"), but not for anything other than violating a major safety rule. *See Auer v. Robbins*, 519 U.S. 452, 137 L. Ed. 2d 79, 117 S. Ct. 905, 909 (1997). Thus, DoL's disciplinary deduction rule, forbids piecemeal pay deductions from salary for other than major safety violations.

The record here shows that the Border Patrol has suspended, or proposed suspensions for, several plaintiffs for a variety of non-safety offenses, such as losing a pager, failing to exercise supervisory review of reports, inappropriate comments to a female subordinate employee, taking home a service vehicle, and making unscheduled shift changes. In addition, the government concedes that an employee classified as a "Supervisory Border Patrol Agent" or a "Supervisory Aircraft Pilot" can be suspended for non-safety rule violations, such as unhygienic personal appearance. Plaintiffs, in short, offer substantial evidence that they are at risk for suspension for non-safety violations. They therefore argue they are entitled to overtime pay on the following reasoning: (1) their entitlement to overtime pay should be assessed under DoL, rather than OPM, regulations; (2) DoL regulations require executive employees to meet the salary-basis test in order to qualify for exempt status; and (3) they do not meet the salary-basis test because they face the realistic possibility of salary reduction of less than a full pay period (i.e., suspensions) for reasons other than major safety violations.

The government's response is that plaintiffs fall under OPM's jurisdiction, not DoL's, and that OPM regulations do not contain a salary-basis test or a disciplinary-deduction rule. Instead, OPM defines the executive exemption by focusing on the nature of the employee's job. *See* 5 C.F.R. § 551.204 (1997).[3] According to the government, OPM's regulation is a proper construction of FLSA that is owed deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

DISCUSSION

When Congress expanded FLSA's coverage to include federal employees, OPM[4] was given responsibility to

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[3] The OPM regulations are more general than the DoL regulations. "Executive employee" is defined as a "supervisor, foreman, or manager who manages a Federal agency or any subdivision thereof . . . and regularly and customarily directs the work of at least three subordinate employees . . . ." 5 C.F.R. § 551.204 (1997). The other criteria OPM uses to define "executive employee" include, (a) primary management duties, (b) authority or significant influence over hiring, firing, or promoting, (c) regular exercise of discretion, (d) supervision over others' work." *Id.* § 551.204(a). There is no explicit requirement to pay an executive employee on a salary basis, and consequently no provision addressing the effect of disciplinary penalties on an employee's salaried status. *Id.; see also Federal Personnel Manual Letter* 551-7 (1975).

[4] At the time, OPM was known as the Civil Service Commission.

administer the act with respect to most federal employees (subject to certain exceptions not relevant here):

> Notwithstanding any other provision of this chapter, or any other law, the Director of the Office of Personnel Management is authorized to administer the provisions of this chapter with respect to any individual employed by the United States . . . .

29 U.S.C.A. § 204(f). The Federal Circuit has held that "administering" includes "the power to interpret the statute and to set forth the guidelines and policies of the agency." *Zumerling v. Devine*, 769 F.2d 745, 750 (Fed. Cir. 1985). Accordingly, it is clear from the plain language of the statute that OPM is empowered to administer FLSA with respect to plaintiffs.

Plaintiffs, however, argue that OPM's power to administer FLSA is limited in one critical respect. They argue that Congress intended that OPM always construe FLSA by taking its lead from the DoL. That is, DoL's regulations control whenever the two agencies' implementations of FLSA are at odds. Thus, according to plaintiffs, DoL's regulations control here notwithstanding the statutory language because OPM's regulations are inconsistent with DoL's regulations.

In support of their position, plaintiffs cite *American Federation of Government Employees v. OPM*, 261 U.S. App. D.C. 273, 821 F.2d 761 (D.C. Cir. 1987) ("*AFGE*"), which invalidated an OPM regulation that presumptively exempted from FLSA's overtime requirements federal employees classified at GS-11 or above, as well as an OPM regulation

defining "executive" employee that did not require the "executive" employee to "customarily and regularly" direct the work of others. 821 F.2d at 771. The court held that OPM's regulation was inconsistent with FLSA and vacated it:

> Since the presumption [of exemption for GS-11s and above] appears to guide or direct the agency to act inconsistently with FLSA and places an unwarranted and, at minimum, confusing burden on the employee, [the regulation] is flawed and must be vacated as inconsistent with the 'meaning, scope, and application' of the FLSA.

Id. In concluding that there was a requirement for consistency, the court relied on legislative history to the 1974 amendments to FLSA indicating that Congress wanted OPM to exercise its administrative powers consistently with DoL:

> the [OPM] will administer the provisions of the [FLSA] in such a manner as to assure consistency with the meaning, scope, and application established by the rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy.

Id. at 769 (*quoting* Fair Labor Standards Amendments of 1974, H.R. Rep. 93-913 at 28 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2837-38) ("House Report").

The law of this circuit is similar. Explaining that the proper standard is whether "OPM's interpretive guidelines

'harmonize with the statute's origin and purpose,' . . . as well as with the Secretary of Labor's regulations," the Federal Circuit upheld the method OPM used to calculate overtime for firefighters as consistent with FLSA and the DoL regulations. *See Zumerling*, 769 F.2d at 750. Applying these standards, this court has also invalidated OPM regulations which impermissibly strayed from FLSA, as measured by their deviation from DoL regulations. *See Adams v. United States*, 36 Fed. Cl. 91, 97 (1996).

However, this court has also made it clear that not every inconsistency is fatal to OPM's regulations. "It would be inappropriate . . . to elevate a statement in the committee report to an ironclad rule barring any inconsistency. Congress knows how to expressly limit grants of authority." *Riggs v. United States*, 21 Cl. Ct. 664, 681 (1990). Indeed, a perfect mesh between Title 5 and Title 29 cannot be expected or required. *See Abreu v. United States*, 22 Cl. Ct. 230, 238 (1991), *aff'd*, 948 F.2d 1229 (Fed. Cir. 1991). Instead, the inquiry must begin and end with the statute. Adverting to the DoL regulations as presumptively the proper interpretation still leaves room for non-identical regulations for federal employees, where justified. As the court wrote in *Adams*, 36 Fed. Cl. at 97, "the best evidence of that intent [the meaning of the statute] is found in the DOL regulations," but in that case the government "had not justified a contrary practice for federal employees." *Id.*

The beginning and ending question is thus: Is OPM's regulation defining the executive exemption impermissibly inconsistent with FLSA? According to plaintiff, OPM's regulation must be invalidated (and DoL's regulation applied) because an employee who would remain non-exempt under

DoL's regulations by virtue of the disciplinary-deduction rule, 29 C.F.R. § 541.118(a), would be exempted from FLSA's overtime requirements under the OPM regulations, which do not contain a salary basis test or a disciplinary deduction rule.

The court notes at the outset that while it is true that the disciplinary-deduction rule of DoL's salary basis test would be fatal to exemption in this case, it does not necessarily follow that OPM's regulations would reach a different result if applied to plaintiffs. Insofar as relevant here, the OPM and DoL regulations defining the executive exemption are similar in most respects. Both look to the whether the employee has duties that are primarily management in nature, whether the employee supervises others, whether the employee has hiring or firing authority, and the degree of discretion the employee regularly exercises. *Compare* 5 C.F.R. § 551.204 with 29 C.F.R. § 541.1. Indeed, plaintiffs' alternative argument is that, even absent the disciplinary-deduction rule, they are exempt under OPM's own regulations.

Plaintiffs assert, however, that the issue was definitively resolved in their favor by *Auer v. Robbins*. Plaintiffs are incorrect. *Auer* did not address the issue before the court, which is whether OPM's regulations are inconsistent with FLSA because they failed to include a salary-basis test or disciplinary-deduction rule. Instead, *Auer* involved a straightforward *Chevron* analysis of DoL's own regulations applied to entities entirely and solely within DoL's jurisdiction. *See* 117 S. Ct. at 909. Moreover, the Court in *Auer* never mandated a salary basis test by either the DoL or OPM, but merely extended the customary deference to DoL's regulations: "Because the FLSA entrusts matters such as this to the Secretary, not the federal courts, we cannot say that the

disciplinary-deduction rule is invalid as applied to law-enforcement personnel." *Id.* at 910. In addition, the Court agreed that applying private-sector standards to the public sector might pose potential Administrative Procedure Act problems:

> The more fundamental objection respondents have to the disciplinary-deduction rule is a procedural one: The Secretary has failed to give adequate consideration to whether it really makes sense to apply the rule to the public sector. Respondents' *amici* make the claim more specific: The Secretary's failure to revisit the rule in the wake of our *Garcia* decision was "arbitrary" and "capricious" in violation of the Administrative Procedure Act.
>
> . . . .
>
> It is certainly true that application of the disciplinary-deduction rule to public-sector employees raises distinct issues that may warrant the Secretary's formal consideration; this much is suggested by the veritable flood of post-Garcia litigation against public employers in this area. But respondents' complaints cannot be raised in the first instance in the present suit.

Id.

This concern is doubly applicable here, where plaintiffs' argument would put the Secretary of Labor in a position of

indirect rulemaking (indirect because DoL rules were promulgated for DoL constituents, not OPM constituents). Caution dictates against simply importing DoL-created standards into the federal sector without any conscious rulemaking at either DoL or OPM. Moreover, as previously indicated, OPM rules may legitimately deviate from DoL rules if the government can justify a contrary practice. *See Adams*, 36 Fed. Cl. at 97.

Under the civil-service system covering the great majority of federal employees, pay is calculated from an *annual* rate of basic pay irrespective of the whether an employee is "labor" or "management." *See* 5 U.S.C.A. § 5332 (1996); *see also* 5 U.S.C.A. § 5101 (1996) (stating that federal "position-classification system can be used in all phases of personnel administration"). Using a salary-basis test in this environment as an indicia of "executive" position has an enormous potential for quixotic results because unskilled employees and management alike are paid an annual salary according to the General Schedule. *See* 5 U.S.C.A. § 5104 (1996). In other words, the salary-basis test would not meaningfully distinguish between, on the one extreme, unskilled federal employees, and on the other extreme, upper federal management. It is not surprising, therefore, that OPM focuses on the work actually being done by the exempt employee, rather than on the peculiarities of the federal government's pay mechanism.

In addition, as the government points out, numerous statutes and regulations subject federal employees across the board to suspension for misconduct. Federal employees of virtually any grade may be suspended under Chapter 5 of Title 5 of the United States Code. Subchapter I, 5 U.S.C.

§§7501-04, permits suspensions of fourteen days or less "for such cause as will promote the efficiency of the service (including discourteous conduct to the public . . . .)" *Id.* 7503. Subchapter II, *5 U.S.C.* §§ 7511-14, allows removal, suspensions of more than fourteen days, reductions in pay, or furlough for thirty days or less "only for such cause as will promote the efficiency of the service." *Id.* § 7513. Subchapter VI, 5 U.S.C. §§ 7531-33, allows the head of an agency to suspend without pay any employee of his agency when he considers that action necessary in the interests of national security. *Id.* § 7532. Subchapter V, 5 U.S.C. §§ 7541-43, applies to the suspension or removal of career senior executive service employees, and permits suspensions of more than fourteen days for a variety of reasons including misconduct and neglect of duty. *Id.* § 7543.

The offenses for which an employee may be disciplined (including by suspension) are legion, as a cursory scan of agency regulations reveals. For example, the Office of Government Ethics prescribes standards of good conduct that all government employees must follow. *See, e.g.*, 5 C.F.R. pt. 2635 (1997). Fourteen "basic obligations of public service" are enumerated in 5 C.F.R. § 2635.101, including requirements that employees "put forth honest effort in the performance of their duties," "not use public office for private gain," and "disclose waste, fraud, abuse, and corruption." In addition, specific rules govern receipt of gifts from outsiders, gifts between employees, conflicting financial interests, impartiality in performing official duties, seeking other employment, misuse of position and government property, and so forth. An employee who violates any of

these provisions is subject to discipline. *Id.* § 2635.106.[5] Some of the regulations, such as those pertaining to financial disclosure, are specifically directed at high-ranking government officials. *See* 5 C.F.R. § 2634.104. An employee who violates these regulations can be suspended. *See* 5 C.F.R. § 2634.701(d). The government also cites a statute of general applicability that imposes a minimum suspension of thirty days for the unauthorized use of a government vehicle. *See* 31 U.S.C. § 1349(b). This reticulate mass of statutory and regulatory law expressly contemplating suspensions for even high-level government employees is further evidence that DoL's disciplinary-deduction rule is not at home in the federal arena.

Plaintiffs acknowledge the existence of these laws, but argue that the government can manipulate the length of suspensions to avoid FLSA liability–the government is free to suspend executives in exact intervals of pay periods without losing the exemption. *See* 29 C.F.R. § 541.118 (stating that "the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any work-week in which he performs no work"). Although theoretically possible, plaintiffs' approach does violence to the principle

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[5] In addition to regulations that affect federal employees government-wide, individual agencies have promulgated standards of conduct governing their employees. *See, e.g.*, 17 C.F.R. pt. 140 (Commodities Futures Trading Commission); 28 C.F.R. pt. 45 (Dep't of Justice); 31 C.F.R. pt. 0 (Dep't of Treasury); 45 C.F.R. pt. 73 (Dep't of Health and Human Services); 47 C.F.R. pt. 19 (Federal Communications Commission).

that the punishment fit the crime. *See Shelly v. Department of Transp.*, 75 M.S.P.B. 677, 682 (1997) ("the most significant factor [in determining a punishment] is the nature of the offense itself"). For instance, misconduct that would merit a three-day suspension would either have to be reduced to a reprimand or increased to a fourteen-day suspension. Nothing in FLSA or its legislative history indicates that Congress intended this bizarre result.[6]

Finally, plaintiffs' argument thwarts the compromise reached in Congress, namely that OPM would administer FLSA. That compromise was considered necessary because of the perception that concurrently administering two sets of laws would result in confusion. *See Zumerling*, 769 F.2d at 749-50. Indeed, this court has commented on the uneasy relationship between FLSA and the civil service system. *See Abreu*, 22 Cl. Ct. at 232, 238. To alleviate potential confusion, Congress expressly carved out a jurisdictional role

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[6] Plaintiffs also attack this argument on the ground that "Congress' bare authorization of suspensions as an option" does not constitute an "actual practice" of imposing suspensions sufficient to defeat the executive exemption. However, *Auer* clarified that an otherwise exempt employee can lose his exempt status where it is "substantially likely" that suspensions will be imposed for violating prescribed norms of conduct. *See 117 S. Ct. at 911.* And a perusal of Merit Systems Protection Board adjudications demonstrates that federal employees are regularly disciplined, including by suspension, for conduct proscribed by the statutes and regulations discussed above. Plaintiffs' suggestion that agencies could avoid overtime by choosing between either not enforcing discipline, or else by tailoring discipline to have suspensions coincide with full pay periods would create an absurd result.

for OPM over most federal employees. *See* 29 U.S.C. §204(f); *see also* House Report, 1974 U.S.C.C.A.N. at 2837. It is contrary to Congress's expressed wish to undermine that compromise by requiring OPM to precisely mimic DoL's every regulatory move.

This court has previously observed the tension between the legislative history of FLSA and the plain meaning of the statute. *See Riggs*, 21 Cl. Ct. at 681. As discussed above, the reading of FLSA urged by plaintiffs, namely, that OPM must include a salary basis test and disciplinary deduction rule in its regulations, makes little sense in the federal sector. Moreover, Plaintiffs' interpretation of FLSA ignores the clear statutory mandate that OPM administer FLSA with respect to federal employees, and leads to "'absurd or futile results . . . plainly at variance with the policy of the legislation as a whole,' which this Court need not and should not countenance." *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 120, 100 L. Ed. 2d 96, 108 S. Ct. 1666 (1987) (internal quotes and cites omitted). Simply put, there is no good reason to require OPM to include in its regulations DoL's salary-basis test or the disciplinary-deduction exception to the salary-basis test.

The Government's Motion

Aside from its conclusory Proposed Finding of Fact # 4, the government has offered no evidence to discharge its burden of establishing that plaintiffs are employees exempt from FLSA's overtime provisions. The court may not presume that plaintiffs are exempt; rather, the government must prove that they "plainly and unmistakably fall 'within the terms and spirit of the exemption . . . .'" *Baca v. United*

States, 29 Fed. Cl. 354, 359 (1993) (citation omitted). The government's cross-motion for summary judgment is accordingly denied.

CONCLUSION

For the reasons stated above, the parties' cross-motions for summary judgment are both denied. Plaintiffs are granted leave to amend their complaint to include Mr. Norbert Gomez. *See supra* note 1. The parties are directed to confer and file a joint status report on or before February 27, 1998, proposing further pretrial proceedings.

/s/ _____
ERIC G. BRUGGINK, Judge

APPENDIX E

[p. 2811]... **FAIR LABOR STANDARDS**
P.L. 93-259

FAIR LABOR STANDARDS AMENDMENT OF 1974

P.L. 93-259, see page 55

Senate Report (Labor and Public Welfare Committee) No. 93-690,
Feb. 22, 1974 [To accompany S. 2747]

House Report (Education and Labor Committee) No. 93-913,
Mar. 15, 1974 [To accompany H.R. 12435]

Senate Conference Report No. 93-760, Mar. 28, 1974
[To accompany S. 2747]

House Conference Report No. 93-953, March 26, 1974
[To accompany S. 2747]

Cong. Record Vol. 120 (1974)

DATES OF CONSIDERATION AND PASSAGE

Senate March 7, 28, 1974

House March 20, 28, 1974

The Senate bill was passed in lieu of the House bill after substituting for its language much of the text of the House bill. The House Report and the House Conference Report are set out.

HOUSE REPORT NO. 93-913

Excerpts

THE Committee on Education and Labor, to whom was referred the bill (H.R. 12435) to amend the Fair Labor Standards Act of 1938 to increase the minimum wage rates under that Act, to expand the coverage of that Act, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment strikes out all after the enacting clause of the bill and inserts a new text which appears in italic type in the reported bill.

INTRODUCTORY STATEMENT

The Fair Labor Standards Act of 1938 was enacted on June 25, 1938. The basic policy of the Act is contained in its second section :

> SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce of labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and

instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing com-...

[p. 2837]...**FAIR LABOR STANDARDS P.L. 93-259**

FEDERAL, STATE, AND LOCAL GOVERNMENT

Section 6 of the bill extends minimum wage and overtime coverage to about 5 million non-supervisory employees in the public sector not now covered by the Act. Approximately 3.5 million public employees, primarily employees in hospitals, schools, and other institutions, were covered by the 1966 amendments: The bill will provide that virtually all non-supervisory government employees will be covered.

The bill, however, establishes an overtime exemption applicable to public employees "engaged in fire protection or law enforcement activities (including security personnel in correctional institutions)".

In the case of public employees first covered by the 1974 amendments, State and local government employees covered by the 1966 amendments, and Canal Zone employees, the bill would provide a minimum wage rate of not less than $1.90 an hour effective on the first day of the second full month after the date of enactment, $2.00 an hour effective January 1, 1975, $2.20 an hour effective January 1, 1976, and $2.30 an

hour effective January 1, 1977. The minimum wage rates applicable to Federal employees covered by the 1966 amendments were discussed earlier.

The impact of a $2.30 an hour minimum wage rate on all such employees is illustrated elsewhere, but it is significant to note here that there would be no impact with respect to newly covered Federal employees.

Coverage of Federal employees is extended by the bill to most employees including wage board employees, non-appropriated fund employees, employees in the Canal Zone who are engaged in employment of the kind described in sections 5102(c) (7) of title 5, U.S.C., and any other civilian employees working for the armed services. Excluded from coverage are military personnel. Basically, the committee did not intend to extend coverage to those persons for whom the tangible benefits of government employment are of secondary significance, for example Peace Corps and VISTA volunteers. By the same token, the committee intends to cover all employees (except professional, executive, and administrative personnel who are exempted under section 13 of the law) in all civilian branches of the Federal Government.

The Secretary of Labor in 1973, reflected the Civil Service Commission's view when he recommended against bringing Federal employees under the coverage of the Fair Labor Standards Act. The Commission's position was that Federal employees are already covered by special pay provisions in title 5, United States Code, and that enactment of this legislation would confuse the administration of these provisions and could raise jurisdictional problems of administration.

Relevant Provisions Involved

The committee resolved this matter by including Federal employees within the coverage of the Act and charging the Civil Service Commission with responsibility for administration of the Act so far as Federal employees (other than employees of the Postal Service, the Postal Rate Commission or the Library of Congress) are concerned. It is the intent of the committee that the Commission will administer the provisions of the law in such a manner as to assure consistency with the meaning, scope, and application established by the rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy. The provisions [p. 2838] of the bill would leave the premium pay provisions of title 5, United States Code, in effect to the extent that they are not inconsistent with the Fair Labor Standards Act.

The Department of Labor in 1970 evaluated the feasibility of extending minimum wage and overtime protection under the Act to non-supervisory employees in State and local governments, and submitted its findings to the Congress. The 1966 amendments extended coverage to public education and hospital institutions.

In a "Summary of Findings," the Department concluded that"

> The nationwide survey of State and local governments (excluding education and hospital institutions) indicates that wage levels for State and local government employees not covered by the FLSA are, on the average, substantially higher than those of workers already covered. Hence, if coverage under the FLSA is

> extended to these workers, comparable minimum wage and overtime standards would not have as great an impact as did the earlier extension of FLSA coverage to employees of State and local government schools, hospitals, and residential care establishments.

The Department estimates that 95,000 of the State and local government employees to be covered by the bill would be benefited by the impact of a $1.90 an hour minimum wage rate; 104,000 would be benefited by the impact of a $2.00 an hour minimum wage rate effective January 1, 1975; 138,000 would be benefited by the impact of a $2.20 an hour minimum wage rate effective January 1, 1976; and 138,000 of that group would be benefited by the impact of a $2.30 an hour minimum wage rate effective January 1, 1977.

In March 1970, the length of the average workweek for nonsupervisory employees in State and local governments was 38.1 hours. Nationwide, over three-fifths of the nonsupervisory employees worked 40 hours during the week surveyed by the Department, but only a tenth worked over 40 hours.

The Department concluded :

> Long workweeks were most prevalent among, employees in the public, safety activity, which includes police and fire departments. A fifth of the public safety employees worked over 40 hours and they comprised half of the employees on long weekends. Public works was also significant in this regard, employing

27 percent of the workers on long weekends.

During the survey week, only 2.3 percent of total nonsupervisory man-hours in State and local governments represented hours worked in excess of 40. If a 40-hour Federal overtime standard were in effect at the time of the survey, the premium pay required for these hours would haw approximated one percent of the weekly wage bill The actual impact of a 40-hour standard would have been less because a substantial proportion of the employees receive premium overtime pay.

This conclusion does not, of course, consider the overtime exemption contained in the bill for police and firemen. The actual impact on State and local governments then, of a 40-hour standard, will be virtually non-existent....

Relevant Provisions Involved

[Code of Federal Regulations]
[Title 5, Volume 1]
[Revised as of January 1, 2003]
From the U.S. Government Printing Office via GPO Access
[CITE: **5CFR551.204]**

[Page 571]

TITLE 5--ADMINISTRATIVE PERSONNEL

CHAPTER I--OFFICE OF PERSONNEL MANAGEMENT

PART 551--PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT--Table of Contents

Subpart B--Exemptions and Exclusions

Sec. 551.**204** Exemption of Federal Wage System employees.

(a) Nonsupervisory. A nonsupervisory employee in the Federal Wage System or in other comparable wage systems is nonexempt, unless the employee is subject to Sec. 551.208 (the effect of performing temporary work or duties on FLSA exemption status) or Sec. 551.209 (the foreign exemption).

(b) Supervisory. A supervisory employee in the Federal Wage System or in other comparable wage systems is exempt only if the employee is an executive employee as defined in Sec. 551.205, unless the employee is subject to Sec. 551.208 (the effect of performing temporary work or duties on FLSA exemption status) or Sec. 551.209 (the foreign exemption).

[Code of Federal Regulations]
[Title 29, Volume 3]
[Revised as of July 1, 2002]
From the U.S. Government Printing Office via GPO Access
[CITE: **29CFR541.118**]

[Page 195-196]

TITLE 29--LABOR

CHAPTER V--WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

Subpart B--Interpretations

Sec. 541.**118** Salary basis.

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

(1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the

operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy or practice provides compensation for such absences, deductions for absences of a day or longer because of sickness or disability may be made before an employee has qualified under such plan, policy or practice, and after he has exhausted his leave allowance thereunder. It is not required that the employee be paid any portion of his salary for such days or days for which he receives compensation for leave under such plan, policy or practice. Similarly, if the employer operates under a State sickness and disability insurance law, or a private sickness and disability insurance plan, deductions may be made for absences of a working day or longer if benefits are provided in accordance with the particular law or plan. In the case of an industrial accident, the "salary basis" requirement will be met if the employee is compensated for loss of salary in accordance with the applicable compensation law or the plan adopted by the employer, provided the employer also has

some plan, policy or practice of providing compensation for sickness and disability other than that relating to industrial accidents.

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption [[Page 196]] will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

(b) Minimum guarantee plus extras. It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $155 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis" For example, a salary of $200 in each week in which any work is performed, and an additional $50 which is made subject to deductions which, are not permitted under paragraph (a) of this section.

(c) Initial and terminal weeks. Failure to pay the full salary in the initial or terminal week of employment is not considered inconsistent with the salary basis of payment. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean

that an employee is on a salary basis within the meaning of the regulations if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual or occasional employment for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations.

[38 FR 11390, May 7, 1973, as amended at 40 FR 7092, Feb. 19, 1975]

Effective Date Note: Paragraph (b) in Sec. 541.118 was revised at 46 FR 3014, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraph (b) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

Sec. 541.**118** Salary basis.

* * * * *

(b) Minimum guarantee plus extras. It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $250 or more a week and in addition, a commission of 1 percent of the branch sales. The

requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $300 in each week in which any work is performed, and an additional $55 which is made subject to deductions which are not permitted under paragraph (a) of this section.

[[Page 197]]

Relevant Provisions Involved

From the U.S. Code Online via GPO Access [wais.access.gpo.gov]
[Laws in effect as of January 2, 2001]
[Document not affected by Public Laws enacted between January 2, 2001 and January 28, 2002]
[CITE: **29USC203**]

TITLE 29--LABOR

CHAPTER 8--FAIR LABOR STANDARDS

Sec. 203. Definitions

As used in this chapter--

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e) (i) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means–

(A) any individual employed by the Government of the United States–

(i) as a civilian in the military departments (as defined in section 102 of title 5),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

(v) in the Library of Congress, or

(vi) the \1\ Government Printing Office;

\1\ So in original. Probably should be preceded by "in".

(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual–

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employes him; and

(ii) who–

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by Such an officeholder to serve on a policymaking level,

(IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u) of this section, such term does...

Relevant Provisions Involved

From the U.S. Code Online via GPO Access [wais.access.gpo.gov]
[Laws in effect as of January 2, 2001]
[Document not affected by Public Laws enacted between January 2, 2001 and January 28, 2002]
[CITE: **29USC204**]

TITLE 29--LABOR

CHAPTER 8--FAIR LABOR STANDARDS

Sec. 204. Administration

(a) Creation of Wage and Hour Division in Department of Labor; Administrator

There is created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this chapter referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate.

(b) Appointment, selection, classification, and promotion of employees by Administrator

The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this chapter and shall fix their compensation in accordance with chapter 51 and subchapter III of chapter 53 of title 5. The Administrator may establish and utilize such regional, local, or other agencies, and utilize

such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) Principal office of Administrator; jurisdiction

The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) Biennial report to Congress; studies of exemptions to hour and wage provisions and means to prevent curtailment of employment opportunities

(1) The Secretary shall submit biennially in January a report to the Congress covering his activities for the preceding two years and including such information, data, and recommendations for further legislation in connection with the matters covered by this chapter as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the minimum wages and overtime coverage established by this chapter, together with his recommendations to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the cost of living and in

productivity and the level of wages in manufacturing, the ability of employers to absorb wage increases, and such other factors as he may deem pertinent. Such report shall also include a summary of the special certificates issued under section 214(b) of this title.

(2) The Secretary shall conduct studies on the justification or lack thereof for each of the special exemptions set forth in section 213 of this title, and the extent to which such exemptions apply to employees of establishments described in subsection (g) of such section and the economic effects of the application of such exemptions to such employees. The Secretary shall submit a report of his findings and recommendations to the Congress with respect to the studies conducted under this paragraph not later than January 1, 1976.

(3) The Secretary shall conduct a continuing study on means to prevent curtailment of employment opportunities for manpower groups which have had historically high incidences of unemployment (such as disadvantaged minorities, youth, elderly, and such other groups as the Secretary may designate). The first report of the results of such study shall be transmitted to the Congress not later than one year after the effective date of the Fair Labor Standards Amendments of 1974. Subsequent reports on such study shall be transmitted to the Congress at two-year intervals after such effective date. Each such report shall include suggestions respecting the Secretary's authority under section 214 of this title.

(e) Study of effects of foreign production on unemployment; report to President and Congress

Whenever the Secretary has reason to believe that in any industry under this chapter the competition of foreign producers in United States markets or in markets abroad, or both, has resulted, or is likely to result, in increased unemployment in the United States, he shall undertake an investigation to gain full information with respect to the matter. If he determines such increased unemployment has in fact resulted, or is in fact likely to result, from such competition, he shall make a full and complete report of his findings and determinations to the President and to the Congress: Provided, That he may also include in such report information on the increased employment resulting from additional exports in any industry under this chapter as he may determine to be pertinent to such report.

(f) Employees of Library of Congress; administration of provisions by Office of Personnel Management

The Secretary is authorized to enter into an agreement with the Librarian of Congress with respect to individuals employed in the Library of Congress to provide for the carrying out of the Secretary's functions under this chapter with respect to such individuals. Notwithstanding any other provision of this chapter, or any other law, the Director of the Office of Personnel Management is authorized to administer the provisions of this chapter with respect to any individual employed by the United States (other than an individual employed in the Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority). Nothing in this subsection shall be construed to affect the right of an employee to bring an action for unpaid minimum wages, or unpaid overtime compensation, and liquidated damages under section 216(b) of this title.

(June 25, 1938, ch. 676, Sec. 4, 52 Stat. 1061; Oct. 26, 1949, ch. 736, Sec. 4, 63 Stat. 911; Oct. 28, 1949, ch. 782, title XI, Sec. 1106(a), 63 Stat. 972; Aug. 12, 1955, ch. 867, Sec. 2, 69 Stat. 711; Pub. L. 87-30, Sec. 3, May 5, 1961, 75 Stat. 66; Pub. L. 93-259, Secs. 6(b), 24(c), 27, Apr. 8, 1974, 88 Stat. 60, 72, 73; 1978 Reorg. Plan No. 2, Sec. 102, eff. Jan. i, 1979, 43 F.R. 36037, 92 Stat. 3783; Pub. L. 104-66, title I, Sec. 1102(a), Dec. 21, 1995, 109 Stat. 722.)

References in Text

The civil service laws, referred to in subsec. (b), are set forth in Title 5, Government Organization and Employees. See, particularly, section 3301 et seq. of Title 5.

The effective date of the Fair Labor Standards Amendments of 1974, referred to in subsec. (d) (3), is the effective date of Pub. L. 93-259, which is May i, 1974, except as otherwise specifically provided, see section 29(a) of Pub. L. 93-259, set out as an Effective Date of 1974 Amendment note under section 202 of this title.

Codification...

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[Laws in effect as of January 2, 2001]
[Document affected by Public Law 106-202 Section 2(a),]
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[Document affected by Public Law 106-202 Section 2(d)]
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[CITE: **29USC207**]

TITLE 29--LABOR

CHAPTER 8--FAIR LABOR STANDARDS

Sec. 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods

for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966–

> (A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,
>
> (B) for a workweek longer than forty-two hours during the second year from such date, or
>
> (C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) Employment pursuant to collective bargaining agreement; employment by independently owned and controlled local enterprise engaged in distribution of petroleum products

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed–

> (1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor

Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty-hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement ...

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[Document not affected by Public Laws enacted between January 2, 2001 and January 28, 2002]
[CITE: **29USC213**]

TITLE 29--LABOR

CHAPTER 8--FAIR LABOR STANDARDS

Sec. 213. Exemptions

(a) Minimum wage and maximum hour requirements

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to–

> (1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the

performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) Repealed. Pub. L. 101-157, Sec. 3(c) (1), Nov. 17, 1989, 103 Stat. 939.

(3) any employee employed by an establishment which is an amusement or recreational establishment organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33\1/3\ per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) Repealed. Pub. L. 101-157, Sec. 3(c) (i), Nov. 17, 1989, 103 Stat. 939.

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or

farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees

over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) Repealed. Pub. L. 93-259, Sec. 23(a) (1), Apr. 8, 1974, 88 Stat. 69.

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) Repealed. Pub. L. 93-259, Sec. 10(a), Apr. 8, 1974, 88 Stat. 63.

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13), (14) Repealed. Pub. L. 93-259, Secs. 9(b) (1), 23(b) (1), Apr. 8, 1974, 88 Stat. 63, 69.

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary); or

(16) a criminal investigator who is paid availability pay under section 5545a of title 5; or

(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is–

(A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and

who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $27.63 an hour.

(b) Maximum hour requirements

The provisions of section 207 of this title shall not apply with respect to–

(l) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49; or

(2) any employee of an employer engaged in the operation of a rail carrier subject to part A of subtitle IV of title 49; or

(3) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act [45 U.S.C. 181 et seq.] ; or...

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No. 03-146

In the Supreme Court of the United States

JOHN W. LOTZ, JORGE GUTIERREZ AND JULIAN PANEK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTION PRESENTED

An Office of Personnel Management regulation implements the overtime provisions of the Fair Labor Standards Act of 1938 as applied to federal employees and defines the provisions' exemption for "executive" employees. The question presented is whether the regulation is invalid because it does not use the "salary basis" test contained in the Department of Labor regulation applicable to private-sector employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-16a) is reported at 322 F.3d 1328. The opinions of the Court of Federal Claims (Pet. App. 17a-26a, 27a-42a) are reported at 40 Fed. Cl. 303 and 51 Fed. Cl. 460.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2003. A petition for rehearing was denied on May 15, 2003 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on July 24, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, requires an employer to compensate an employee at the rate of one and a half times the employee's regular rate of pay for overtime worked in excess of 40 hours per week. 29 U.S.C. 207(a). This overtime scheme applies to all employees except those whom the FLSA exempts, a category that includes "executive" employees. 29 U.S.C. 213(a)(1). The FLSA does not define the term "executive." See Pet. App. 12a.

The Fair Labor Standards Amendments of 1974 (1974 Amendments), Pub. L. No. 93-259, 88 Stat. 55, made the FLSA applicable to the federal government, 29 U.S.C. 203(e)(2), and gave the Civil Service Commission, now the Office of Personnel Management (OPM), authority to administer the FLSA as it applies to federal employees, 29 U.S.C. 204(f). As a result of the 1974 Amendments, two separate entities interpret the FLSA exemptions. The Department of Labor (DOL) promulgates regulations applicable to the private sector, 29 U.S.C. 204, and OPM promulgates regulations applicable to the federal government, 29 U.S.C. 204(f). According to the House Report accompanying the 1974 Amendments, the Committee on Education and Labor intended that the Civil Service Commission would administer the FLSA "in such a manner as to assure consistency with the meaning, scope, and application established by the rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy." H.R. Rep. No. 913, 93d Cong., 2d Sess. 28 (1974).

Under the applicable OPM regulation, 5 C.F.R. 551.205, an employee is an "executive," and thus exempt from the FLSA's overtime provisions, if he or she is a "supervisor or manager who manages a Federal agency or any subdivision thereof" and "customarily and regularly directs the work of subordinate employees." *Ibid.* The employee must also have the authority to make personnel changes and customarily and regularly exercise discretion and independent judgment in planning and assigning work. 5 C.F.R. 551.205(a).

DOL's regulation concerning the executive exemption, 29 C.F.R. 541.1, is similar to OPM's, except that it also includes a requirement that the employee be paid on a "salary basis," 29 C.F.R. 541.1(f), which means that the employee must "regularly receive[] each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation," 29 C.F.R. 541.118(a). An employee does not meet DOL's salary-basis test, however, if his or her pay is "subject to reduction because of variations in the quality or quantity of the work performed." *Ibid.* And while the possibility that an employee's pay will be reduced for violations of "safety rules of major significance" does not "affect the employee's salaried status," 29 C.F.R. 541.118(a)(5), the availability of pay reductions for other violations does. This is sometimes referred to as the "disciplinary deduction" exception to the salary-basis test. See *Auer* v. *Robbins*, 519 U.S. 452, 458-459 (1997).

2. Petitioners are GS-13 supervisory border patrol agents. Pet. App. 19a.[1] They were originally plaintiffs

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[1] When this case began, petitioners were employed by the Immigration and Naturalization Service. See Pet. App. 7a, 10a, 15a. That agency has since been abolished and its components

in *Adams* v. *United States*, a suit in the Court of Federal Claims alleging that supervisory border patrol agents had improperly been denied overtime pay under the FLSA. *Id.* at 18a.[2] The plaintiffs in *Adams* filed a motion for summary judgment, contending that OPM's "executive employee" regulation was invalid because it differed from DOL's "executive employee" regulation; that they should be covered by the salary-basis test and its disciplinary-deduction exception; that the undisputed evidence established that they were subject to disciplinary suspensions and thus not within the executive exemption under the DOL regulation; and that they were therefore entitled to overtime pay under the FLSA. *Id.* at 30a.

The Court of Federal Claims denied petitioners' motion for summary judgment. Pet. App. 27a-42a. It held that, while a DOL regulation is presumed to be the proper interpretation of the FLSA, a different regulation for federal employees is permissible when it is justified (*id.* at 32a-34a), and that there is a justification for OPM's "executive employee" regulation not to include a salary-basis test (*id.* at 37a-41a). The court explained that, under the civil-service system, which covers "the great majority of federal employees" (*id.* at 37a), federal pay is calculated from an annual rate of basic pay for both "management" and "labor," not just

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transferred into the Department of Homeland Security. See 6 U.S.C. 291. Petitioners now work for the Bureau of Border Security. See 6 U.S.C. 251-252.

[2] The claims of some of the plaintiffs in *Adams*, including petitioners, and the claims of some of the plaintiffs in *Barnes* v. *United States*, which involved the same issues, were subsequently severed and consolidated in *Bates* v. *United States*. When *Bates* reached the court of appeals, it was restyled *Billings* v. *United States*. See Pet. 2-3.

for management (*ibid.*), and federal employees "across the board" (*ibid.*), not just unskilled employees, are subject to various statutorily required suspensions without pay (*id.* at 37a-41a). The court thus concluded that application of DOL's salary-basis test would not meaningfully distinguish "unskilled federal employees" from "upper federal management" (*id.* at 37a), and would lead to absurd results (*id.* at 41a).

The Court of Federal Claims subsequently granted the government's motion for summary judgment and dismissed petitioners' complaint. Pet. App. 17a-26a. It concluded that petitioners satisfy the requirements of the OPM regulation defining an executive employee, and that they are therefore exempt from the FLSA's overtime provisions. *Id.* at 21a-26a.

3. The court of appeals affirmed. Pet. App. 3a-16a.

The court held that the OPM regulation defining an "executive" employee is a reasonable interpretation of the FLSA and that the difference between OPM's definition and DOL's definition is permissible, because it "effectuate[s] the consistency of application of the [FSLA] to both federal and non-federal employees." Pet. App. 13a. The court relied on the fact that federal employees are subject to suspensions under Title 5 of the United States Code that are not applicable in the private sector and that, under petitioners' view, "nearly every federal employee would be considered non-exempt," because Title 5 applies to the "vast majority" of federal employees. *Ibid.* Observing that the OPM regulation and the DOL regulation are "nearly identical, but for the salary-basis test," the court concluded that the difference between the regulations is "no more than needed to accommodate the difference between private and public sector employment." *Ibid.*

The court of appeals (Pet. App. 14a) found the case before it distinguishable from *American Federation of Government Employees* v. *Office of Personnel Management*, 821 F.2d 761 (D.C. Cir. 1987) (*AFGE*), which invalidated an earlier version of OPM's regulation defining an executive employee on the ground that it differed in certain respects from DOL's regulation. *Id.* at 771. That case, according to the court of appeals, stands for the proposition that, "under the same facts," a federal employee should receive the same overtime compensation as a private-sector employee. Pet. App. 14a. This case does not involve "the same facts," the court said, because federal employees "are subject to Title [5] suspensions not present in the private sector." *Ibid.*

ARGUMENT

Petitioners contend (Pet. 4-8) that the OPM "executive exemption" regulation applicable to federal employees is invalid, because it differs from the DOL "executive exemption" regulation applicable to private-sector employees. They contend (*ibid.*) that the court of appeals erred in concluding otherwise, and that its decision conflicts with the D.C. Circuit's decision in *AFGE*. Petitioners are mistaken. The court of appeals' decision is correct and does not conflict with any decision of any other court. Further review is therefore unwarranted.

1. OPM's regulation is a reasonable interpretation of FLSA's executive-employee exemption and permissibly differs from DOL's regulation. As the court of appeals observed (Pet. App. 13a), Title 5 of the United States Code subjects the "vast majority of all federal employees" to various types of disciplinary actions that are "not applicable in the private sector." See, *e.g.*,

5 U.S.C. 7511-7514 (allowing for removal, suspension, grade reduction, pay reduction, or furlough to promote efficiency of service); 5 U.S.C. 7531-7533 (allowing for suspension or removal in interest of national security). As the court of appeals also observed (Pet. App. 13a), applying the disciplinary-deduction rule to both federal and private-sector employees would mean that the FLSA's overtime provisions cover "nearly every federal employee," but cover a far smaller proportion of private-sector employees. Contrary to petitioners' contention (Pet. 5), that would lead, not to "equity and fairness between Federal and non-Federal employees," but to inequity and unfairness. Applying different rules to employees who are differently situated is not only reasonable but faithful to the expectation, expressed in the House Report accompanying the 1974 Amendments, that OPM would administer the FLSA "in such a manner as to assure consistency" in the law's application. H.R. Rep. No. 913, 93d Cong., 2d Sess. 28 (1974).

2. Petitioners are mistaken in their contention (Pet. 6-8) that the court of appeals' decision conflicts with the D.C. Circuit's decision in *AFGE*.

a. Relying on the House Report, *AFGE* applied the principle that OPM is "obliged to exercise its administrative authority in a manner that is consistent with the Secretary of Labor's implementation of the FLSA" (821 F.2d at 770), and invalidated an earlier version of the OPM regulation defining an "executive" employee because it differed in certain respects from the DOL regulation (*id.* at 771). The provisions of the DOL regulation at issue in *AFGE* (*ibid.*)—provisions that, at the time, did not appear in the OPM regulation (see 5 C.F.R. 551.204 (1986))—stated that, to be an "executive," an employee must manage the "enterprise" or a "department" of the "enterprise" in which he is em-

ployed and must "customarily and regularly" direct the work of others (29 C.F.R. 541.1(a) and (b)). Requiring that OPM include comparable provisions in its regulation—as it has since done (see 5 C.F.R. 551.205)—is understandable, because there is no obvious difference between federal and private-sector employment that justified the differences in the regulations, and because it was likely that, as a result of the differences, similarly situated federal and private-sector employees would be treated differently.

Precisely the opposite is true of the disciplinary-deduction rule. By omitting that provision from its regulation, OPM has increased the likelihood that similarly situated federal and private-sector employees will be treated similarly, since, as explained above, applying the disciplinary-deduction rule to federal managerial employees would mean that they are much more likely to be entitled to overtime pay than their counterparts in the private sector. The court of appeals correctly concluded, therefore, that this case, unlike *AFGE*, does not involve employment under "the same facts." Pet. App. 14a.

b. Contrary to petitioners' assertion (Pet. 7), it is not the government's position that, to uphold an OPM regulation that differs from a DOL regulation, a court need only identify "some difference" between federal employees and private-sector employees. In order to ensure that similarly situated government and private-sector employees are treated similarly, applicable OPM and DOL regulations may differ when there is a difference between government and private-sector employment that justifies the difference in the regulations. There was no such difference in *AFGE*, but there is here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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